No. 10-702

# In the Supreme Court of the United States

RICHARD MUNOZ, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
*Acting Solicitor General*
*Counsel of Record*
LANNY A. BREUER
*Assistant Attorney General*
SANGITA K. RAO
*Attorney*
*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTION PRESENTED

Whether the court of appeals applied the correct standard of review in reversing the district's court grant of a new trial motion based on ineffective assistance of counsel.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-51) is published at 605 F.3d 359. The memorandum and order of the district court granting petitioner's motion for a new trial (Pet. App. 52-76) is unreported, but is available at 2009 WL 529859.

### JURISDICTION

The judgment of the court of appeals was entered on May 18, 2010. A petition for rehearing was denied on August 27, 2010 (Pet. App. 77-78). The petition for a writ of certiorari was filed on November 23, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted of one count of conspiring to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. 846; and one count of aiding and abetting the distribution of 500 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1). Pet. App. 10. The district court granted petitioner a new trial based on ineffective assistance of counsel. *Id.* at 52-76. The court of appeals reversed. *Id.* at 1-51.

1. In July 2006, Tennessee state authorities arrested a Tennessee methamphetamine dealer and her Tennessee supplier. Pet. App. 3. The supplier told authorities that he had obtained his methamphetamine from Jose Luis Tagaban in California. *Ibid.* Federal and state authorities set up a sting operation in which the Tennessee supplier ordered drugs from Tagaban. *Ibid.* When $2000 was wired to Tagaban as part of the deal, petitioner picked up the money order. *Ibid.* Three days later, a federal Drug Enforcement Administration agent photographed petitioner dropping off a FedEx package; the following day, a FedEx package containing approximately 586 grams of methamphetamine arrived in Tennessee. *Ibid.*

2. Petitioner, Tagaban, the Tennessee dealer, the Tennessee supplier, and two others were indicted in the Eastern District of Tennessee. 06-cr-23 Docket entry No. 1 (July 25, 2006). The indictment charged petitioner with one count of conspiring to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. 846; and one count of distributing and aiding and abetting the distribution of 500 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and

(b)(1)(A)(viii). *Ibid.* All of the defendants except for petitioner pleaded guilty and agreed to cooperate with the government. Pet. App. 4.

The government presented several witnesses at trial. Tagaban testified that he and petitioner were friends as well as coworkers at the local irrigation district; that petitioner had attended parties at his house at which "dope" was available; that petitioner had witnessed him consummating a drug deal in his garage; and that petitioner had mailed two packages for him, the second time with knowledge that the package contained methamphetamine. Pet. App. 5; 11/7/2006 Trial Tr. 56-61, 65-67, 79. Another cooperating co-conspirator testified that petitioner was often present when he made payments to or received drugs from Tagaban at work; this co-conspirator also corroborated Tagaban's testimony about petitioner's presence at parties involving drug use, but could not confirm whether petitioner had witnessed the drug use. Pet. App. 6; 11/7/2006 Trial Tr. 100-104. Two Tennessee agents testified that petitioner had admitted, after his arrest, to knowingly shipping packages containing drugs. Pet. App. 4; 11/7/2006 Trial Tr. 25, 118, 126.

Petitioner testified in his own defense. He admitted retrieving the money order and sending the two packages, but claimed to lack knowledge that drugs were involved. Pet. App. 6-8; 11/7/2006 Trial Tr. 144-151. He also testified that he had never seen Tagaban participate in drug deals during work hours; had never seen the co-conspirator who had testified about such deals; and had never seen drugs at any gatherings he had attended at Tagaban's house. Pet. App. 9; 11/7/2006 Trial Tr. 159-162. Petitioner also denied that he had admitted knowledge of shipping drugs to the Tennessee agents; accord-

ing to petitioner, he had simply offered a guess, in response to questioning, about what might have been in the packages he had sent. Pet. App. 8-9; 11/7/2006 Trial Tr. 152-155. In addition to his own testimony, petitioner also presented good-character testimony from a California law enforcement officer who had been his neighbor for over 20 years. Pet. App. 9; 11/7/2006 Trial Tr. 169-170.

The jury convicted petitioner on both counts. Pet. App. 10. The district court denied petitioner's motion for acquittal. *Id.* at 54. The district court reasoned that the "critical disputed fact at trial" was petitioner's knowledge that a package he had shipped contained methamphetamine; that there was contradictory evidence on that point (primarily Tagaban's and petitioner's testimony); and that the jury was entitled to credit the government's evidence. *Ibid.*

3. Petitioner thereafter retained new counsel and filed a belated motion for a new trial under Federal Rule of Criminal Procedure 33. Pet. App. 55. As relevant here, he alleged that he had received ineffective assistance of counsel. *Ibid.*

The district court held an evidentiary hearing. Pet. App. 11. Petitioner's sister testified that she had contacted petitioner's trial counsel to suggest that he call her as a character witness or have her put him in touch with other character witnesses, but that counsel had "summarily rejected" her offer. *Ibid.* She also testified that counsel had untruthfully told her that he had filed a change-of-venue motion and that the motion had been denied. 6/21/2007 Hearing Tr. 33, 38. A witness who had worked with petitioner and Tagaban testified to petitioner's good character and reputation for honesty and said that he was not "quite sure whether" Tagaban was

truthful. *Id.* at 39, 85. Petitioner also submitted declarations from various people (such as his girlfriend) attesting to his good character or stating that they had attended parties at Tagaban's house and had not seen drug use there. See generally 06-cr-23-2 Docket entry No. 133 (E.D. Tenn. May 8, 2007). Petitioner had originally planned to call his trial counsel to testify at the hearing, but elected not to do so after the government pointed out that the testimony might result in a waiver of the attorney-client privilege. Pet. App. 11-12. The parties stipulated that counsel had not hired a private investigator. *Id.* at 12.

The district court granted petitioner's new-trial motion. Pet. App. 52-76. The court recognized that to prevail on an ineffective-assistance claim, petitioner was required to show both that his counsel's performance had been constitutionally deficient and that prejudice had resulted. *Id.* at 64 (citing *Strickland* v. *Washington*, 466 U.S. 668, 687-688, 692 (1984)). The court believed that because the ineffective-assistance claim arose in the context of a new-trial motion, it was empowered to act as a "thirteenth juror" and could therefore weigh evidence and consider the credibility of witnesses, rather than deferring to inferences that the jury reasonably could have drawn in reaching a guilty verdict. *Id.* at 56-57 (citation omitted).

On the issue of performance, the district court believed that trial counsel's performance fell below the constitutional minimum because he should have either moved for a change of venue to California or conducted a more thorough pre-trial investigation into potential character witnesses. Pet. App. 70. In the court's view, once petitioner's last co-defendant had pleaded guilty, the case was no longer about whether a transcontinental

drug conspiracy existed, but was instead focused solely on the narrow issue of petitioner's credibility about his claimed lack of knowledge of that conspiracy. *Id.* at 66-68. Because California had been the location for petitioner's own acts and was the home of his character witnesses, the court concluded that counsel should have attempted to transfer venue there or at least conducted more research there. *Id.* at 70. "The record," the court stated, "is devoid of evidence showing that [petitioner's] counsel interviewed these [potential character] witnesses or conducted other investigation as to the possible value of their trial testimony." *Id.* at 68.

On the issue of prejudice, the court found a "reasonable probability" that, but for counsel's performance, the trial outcome would have been different. Pet. App. 75. The court stated that, in its view, both petitioner and Tagaban had been credible witnesses and that "extrinsic evidence regarding * * * relative credibility," such as testimony from character witnesses, would likely have tipped the balance. *Id.* at 73-74. The court acknowledged in a footnote that the Tennessee agents had testified to incriminating post-arrest statements by petitioner, but stated that "the Court is of the opinion that the [agents'] interpretation of [petitioner's] statements could have easily been in error" and that "[i]n any event," the agents' testimony only "reinforce[d]" the court's conclusion that extrinsic credibility evidence was important to petitioner's case. *Id.* at 74 n.5.

4. The court of appeals reversed. Pet. App. 1-51. The court observed that the district court, in evaluating petitioner's motion, had incorrectly applied the "thirteenth juror" standard, which applies only to motions seeking a new trial based on the manifest weight of the evidence. *Id.* at 29 n.9. As for its own standard of re-

view, the court stated that "[a]n ineffective assistance of counsel claim 'is a mixed question of law and fact, for which district-court determinations are subject to de novo review.'" *Id.* at 12 (quoting *Railey* v. *Webb*, 540 F.3d 393, 415 (6th Cir. 2008), cert. denied, 129 S. Ct. 2878 (2009)). The court perceived no reason to deviate from that standard because this ineffective-assistance claim arose in the context of a new-trial motion, as to which a district court's orders are typically reviewed for abuse of discretion. *Id.* at 13. It explained that "mixed questions of law and fact involve the *application of law* to fact, *Ornelas v. United States*, 517 U.S. 690, 696 (1996), and an improper application of the law constitutes an abuse of discretion." *Ibid.* (internal quotation marks and brackets omitted). "Accordingly," the court continued, "we give no deference to the district court's application of the *Strickland* ineffective-assistance standard to the facts of this case." *Ibid.*

On the merits of the ineffective-assistance claim, the court of appeals stressed that "[t]he *defendant* must overcome the presumption that, under the circumstances, a challenged action or omission might be considered sound trial strategy." Pet. App. 37 (quoting *Strickland*, 466 U.S. at 690) (emphasis added by court; brackets omitted). The court of appeals identified error in the district court's evaluation of petitioner's claim. The district court had stated that the record was "devoid of evidence" that petitioner's counsel had interviewed or considered calling various character witnesses. *Id.* at 68. But the court of appeals stated that (1) the "district court failed to note that [petitioner's counsel] *did* locate and call a character witness, and an ideal one" (petitioner's neighbor); and (2) that, because neither petitioner nor his counsel had testified, the record was

"equally 'devoid of evidence' showing that [petitioner's counsel] *did not* conduct extensive investigation into other potential character witnesses, unbeknownst to [petitioner's] sister." *Id.* at 39-40. The court of appeals also concluded that any deficient performance on the character-evidence issue had not been prejudicial: it observed that the "'contest of credibility' was not as evenly matched as the district court's opinion suggests, because other testimony aside from Tagaban's supported the government's case; and that "additional character testimony would have been largely cumulative" because petitioner's neighbor, Tagaban, and the government itself in closing argument had all made favorable statements about petitioner's character. *Id.* at 41-42.

The court of appeals also concluded that no ineffective assistance had resulted from the absence of a change-of-venue motion. Pet. App. 43-44. The court reasoned that it would have been sound trial strategy for petitioner's counsel, a long-time Tennessee lawyer, to believe that familiarity with the judge or potential rapport with the jury might increase the chances of acquittal. *Id.* at 44. The court additionally concluded, largely for the same reasons it had discussed with respect to the potential character evidence, that petitioner had not been prejudiced by having his trial away from the home of his potential character witnesses. *Id.* at 44-45.

The court of appeals finally rejected two ineffective-assistance arguments on which the district court had not relied. First, it concluded that petitioner's counsel had not been ineffective in his cross-examination of Tagaban. Pet. App. 45-48. Although counsel might have pointed out that a prior statement by Tagaban, claimed by the government to be consistent with Tagaban's testimony, actually did not address the disputed issue in Tagaban's

testimony, the court concluded that counsel had conducted an effective cross-examination and was not constitutionally required to identify and emphasize "*every*" potential line of questioning. *Id.* at 47-48. Second, the court concluded that counsel had not been ineffective for failing to present other impeachment evidence against Tagaban. *Id.* at 49-51. Two previous presentence reports for Tagaban had only "marginal utility in impeaching Tagaban's truthfulness," and thus the court determined that counsel's failure to have found or used them was neither deficient nor prejudicial. *Id.* at 49-50. The court also determined that it was neither deficient nor prejudicial not to have used the testimony of an incarcerated drug dealer who, according to an investigator's affidavit, recalled Tagaban telling him that petitioner was innocent. *Id.* at 50. Because petitioner's counsel had not testified, the court could not conclude that counsel had not located the drug dealer and decided that the downside of calling a drug dealer as a defense witness outweighed the potential benefit of introducing a hearsay statement admissible only to impeach a single witness (Tagaban) and not for the truth of the matter asserted. *Ibid.*

## ARGUMENT

Petitioner contends (Pet. 16-37) that the court of appeals erred by failing to defer to the district court's factual findings in reviewing his ineffective-assistance claim. That contention is based on a mistaken interpretation of the court of appeals' opinion, which reviewed only the application of the ineffective-assistance standard de novo. The court of appeals' fact-bound rejection of petitioner's ineffective-assistance claim is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. Under *Strickland* v. *Washington*, 466 U.S. 668 (1984), a defendant alleging a Sixth Amendment ineffective-assistance-of-counsel claim must demonstrate both that counsel's performance fell "below an objective standard of reasonableness" (*id.* at 688), and that, as a result of counsel's unprofessional errors, "there is a reasonable probability that * * * the results of the proceedings would have been different" (*id.* at 694). *Strickland* explains that, although factual findings made by a district court "in the course of deciding an ineffectiveness claim" are "subject to the clearly erroneous standard," both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact that should be reviewed de novo. *Id.* at 698.

Petitioner asserts (Pet. i) that the court of appeals gave "'no deference' to the district court's findings of fact" in this case. See Pet. 2, 26. That assertion is incorrect. What the court of appeals actually said was: "we give no deference to the district court's *application* of the *Strickland* standard *to* the facts of this case." Pet. App. 13 (emphasis added); see *id.* at 12 ("An ineffective-assistance-of-counsel claim is a mixed question of law and fact, for which district-court determinations are subject to de novo review."). The court of appeals' de novo review of the mixed law-fact issues of performance and prejudice was consistent with (indeed, required by) *Strickland*. See 466 U.S. at 698.

It was additionally consistent with the court of appeals' own precedent, which draws a distinction between ineffective-assistance *claims* (which are reviewed de novo) and the *factual findings* underlying those claims (which are reviewed for clear error). The court of appeals recognizes that even though it "review[s] de novo

claims of ineffective assistance of counsel," any "findings of fact pertinent to the ineffective assistance of counsel inquiry are subject to a 'clearly erroneous' standard of review." *United States* v. *Jackson*, 181 F.3d 740, 744 (6th Cir. 1999). See, *e.g.*, *Mallett* v. *United States*, 334 F.3d 491, 497 (6th Cir. 2003), cert. denied, 540 U.S. 1133 (2004); *Moss* v. *United States*, 323 F.3d 445, 454 (6th Cir.), cert. denied, 540 U.S. 879 (2003). Indeed, in his petition for rehearing en banc, petitioner himself acknowledged that the court of appeals "has repeatedly held that while claims of ineffective assistance of counsel are reviewed de novo, 'any findings of fact pertinent to the ineffective assistance of counsel inquiry are subject to a "clearly erroneous" standard of review.'" C.A. Pet. for Reh'g En Banc 6 (quoting *Jackson*, 181 F.3d at 744, and citing numerous other Sixth Circuit cases).

Because the court of appeals applies in general, and applied in this case, the standard of review advocated by petitioner, his suggestion of a conflict among the circuits (Pet. 16-26) is incorrect. The court of appeals' precedents are consistent with the precedents of its sister circuits in deferring to factual findings in the ineffective-assistance context. See Pet. 16-20 (citing cases). Nor does the Fourth Circuit follow a different rule (see Pet. 25), as petitioner himself acknowledged in his rehearing petition below. See Pet. for Reh'g En Banc 7 (citing *Washington* v. *Murray*, 4 F.3d 1285 (4th Cir. 1993), to support the proposition that "*[a]ll* other Circuits require the courts of appeals to defer to a district court's factual findings, reversing these findings only if they are clearly erroneous") (emphasis added); see *United States* v. *Nicholson*, 611 F.3d 191, 205 (4th Cir. 2010).

2. Petitioner additionally argues (Pet. 26-37) that the court of appeals erred in rejecting his ineffective-

assistance claim. To the extent that petitioner takes issue with the court of appeals' case-specific conclusions, his fact-bound arguments do not warrant certiorari. Cf. *Burger* v. *Kemp*, 483 U.S. 776, 785 (1987) (recognizing, in context of a conflict-of-interest ineffective-assistance claim, that "the regional courts of appeals are in a far better position than we are to conduct appellate review of these heavily fact-based rulings").

To the extent that petitioner seeks to illustrate that the court of appeals was insufficiently deferential in its standard of review, his argument lacks merit. Petitioner's arguments fall primarily into two categories. First, he faults the court of appeals for purportedly failing to defer to "factual determinations" about the relative credibility of witnesses. *E.g.*, Pet. 31-32. But as the court of appeals explained, and petitioner does not dispute, the district court was not permitted to make such "determinations" in the first place, because the district court may not act as a "thirteenth juror" in the context of an ineffective-assistance claim. Pet. App. 29 n.9. Second, petitioner contends that the court of appeals should have deferred to findings about what investigation his counsel did or did not undertake, or judgments his counsel did or did not make. Pet. 29, 31, 35. But in the absence of any testimony from counsel (or petitioner) himself, there was no record from which the district court could have made factual findings on these issues. See, *e.g.*, Pet. App. 39-40. Petitioner's election not to waive attorney-client privilege to allow his counsel to testify does not entitle him to have all inferences drawn in his favor. See *Strickland*, 466 U.S. at 688 ("[A] court must indulge the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the

presumption that, under the circumstances, the challenged action might be considered sound trial strategy.") (internal quotation marks omitted); *Chandler* v. *United States*, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000) ("[W]here the record is incomplete or unclear about counsel's actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment.") (citation and brackets omitted), cert. denied, 531 U.S. 1204 (2001).*

In any event, even assuming that the court of appeals had, contrary to its own precedent, failed properly to defer to the district court, further review would nevertheless be unwarranted. Such a deviation from precedent would be for the court of appeals, not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Further review in this Court is therefore unnecessary.

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* Additional arguments by petitioner likewise lack merit. Petitioner provides no support for any suggestion that the court of appeals was required to presume that counsel was ineffective in this case just because he was deemed ineffective in another case several years earlier. See Pet. 28-29 & n.7; Pet. App. 79-90. Nor is it reasonable for petitioner to argue (Pet. 27) that the court of appeals' criticism of the district court for failing even to mention the character witness that petitioner's counsel did call (Pet. App. 39-40) was impermissible factfinding.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
*Acting Solicitor General*
LANNY A. BREUER
*Assistant Attorney General*
SANGITA K. RAO
*Attorney*

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